

**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES**

In the Matter of)	Case No. 03-O-00769-RAP
)	
DAVID BRIAN WEINTRAUB,)	DECISION INCLUDING DISBARMENT
)	RECOMMENDATION AND ORDER OF
Member No. 152571,)	INVOLUNTARY INACTIVE
)	ENROLLMENT
<u>A Member of the State Bar.</u>)	

I. Introduction

In this contested matter, respondent DAVID BRIAN WEINTRAUB is charged with three counts of misconduct in one client matter. The court finds, by clear and convincing evidence, that respondent is culpable of all of the charges involving (1) failure to pay client funds promptly, (2) failure to maintain client funds in trust account, and (3) moral turpitude-misappropriation.

In view of respondent's misconduct and the evidence in aggravation, the court recommends that respondent be disbarred.

II. Pertinent Procedural History

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges on December 22, 2004. The State Bar filed an Amended Notice of Disciplinary Charges (NDC) on June 10, 2005. Respondent filed a response to the NDC on August 8, 2005.

As a result of respondent's failure to file a pretrial statement, the court ordered that respondent be precluded from presenting any witnesses or evidence at trial. (Rules Proc. of State Bar, rule 211(f).) Respondent was allowed to testify at trial, however.

Trial was held on November 16 and 17, 2005. The State Bar was represented in this proceeding by Deputy Trial Counsel Joseph R. Carlucci. Respondent appeared at trial in propria

persona. The court took this proceeding under submission at the conclusion of trial on November 17, 2005.

III. Findings of Fact and Conclusions of Law

A. Jurisdiction

Respondent was admitted to the practice of law in California on June 6, 1991, and has since been a member of the State Bar of California.

B. The Anderson Matter

On April 13, 2001, John E. Anderson (Anderson) hired respondent to represent him in a personal injury matter. The retainer agreement called for respondent to receive a third of any gross recovery at any time prior to a lawsuit being filed or 40% of any gross recovery after a lawsuit is filed. (Exhibit 1.)

In early January 2002, respondent settled Anderson's personal injury claim for \$22,000. On January 10, 2002, American Family Insurance Group issued a settlement check in the amount of \$22,000 made payable to "Attorney David B. Weintraub Trust Account" on behalf of Anderson, which respondent received. (Exhibit 2.)

On January 11, respondent deposited Anderson's \$22,000 settlement check in his Washington Mutual client trust account. (Exhibit 23, p.7.) Respondent did not immediately disburse the settlement funds to Anderson or two medical providers, Kaiser Permanente and Southland Spine Center. According to the settlement agreement, respondent was to receive \$7,260 for attorney fees. Kaiser was owed \$3,981 and Southland was owed \$3,110 on their medical liens.

Respondent informed Anderson of the settlement and that the two medical providers were, at present, not reducing the amount of their medical liens. Although respondent offered Anderson a partial disbursement of his share of the settlement, Anderson preferred to wait for the full amount of his share until there was a final resolution with the medical providers. After conferring with respondent, Anderson believed the final distribution would take place in about one week.

In April 2002, Anderson spoke with respondent by telephone and asked him to resolve the issue of the medical liens and disburse his settlement funds.

On May 29, 2002, Anderson faxed a letter to respondent requesting disbursement of the

settlement funds to Anderson and to Anderson's medical providers. (Exhibit 4.)

On July 12, 2002, Anderson faxed another letter to respondent in which Anderson referenced and repeated his May 29, 2002, request that respondent disburse Anderson's settlement funds. (Exhibit 5.) Respondent testified that he did not receive Anderson's May 29 and July 12, 2002, letters. The court finds that respondent's testimony in this matter was not credible.

On October 10, 2002, after Anderson had complained to the State Bar of California about respondent's conduct, respondent sent Anderson a written proposed disbursement of the settlement funds. (Exhibit 9.) Anderson approved the disbursement on October 11, 2002, which authorized Respondent to take \$7,260 as his fee, to pay \$3,981 to Kaiser, \$3,310 to Southland, and \$7,449 to Anderson.

On October 11, 2002, respondent paid Anderson \$7,449 by check drawn on respondent's client trust account. (Exhibit 10.)

On April 11, 2003, respondent paid Kaiser \$1,900 by check drawn on his client trust account. (Exhibit 22.) The \$1,900 paid to Kaiser represented a \$2,081 reduction of the \$3,981 disbursement that Anderson agreed to.

On May 7, 2003, respondent paid Southland \$2,755 by check drawn upon his client trust account. The \$2,755 paid to Southland represented a \$555 reduction of the \$3,310 disbursement to which Anderson agreed.

On June 4, 2003, Anderson received from respondent a \$3,581 check made payable to Anderson drawn from his client trust account. (Exhibit 21.) The memo portion of the check indicates that check represented the balance of Anderson's settlement funds.

Pursuant to the disbursement authorized by Anderson, from the time of respondent's deposit of Anderson's settlement funds into his client trust account on January 11, 2002, respondent was required to maintain in his trust account \$14,740 until Anderson and Anderson's two medical providers, Kaiser and Southland, had been paid.

After respondent's deposit of Anderson's settlement funds, the balance in his client trust account fell below the sum of \$14,740 on several occasions before Anderson or either of his medical providers had been paid. By October 2, 2002, the balance in respondent's client trust account had

fallen to \$2,001.63. Accordingly, respondent misappropriated at least \$12,738.37 of client funds. He has not explained what happened to the money.

Count 1: Failure to Pay Client Funds Promptly (Rules Prof. Conduct, Rule 4-100(B)(4))¹

Rule 4-100(B)(4) provides that a member must promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive.

There is clear and convincing evidence that respondent wilfully violated rule 4-100(B)(4) by failing to promptly disburse Anderson's settlement funds for 15 months, as requested by Anderson, to Anderson, Kaiser, and Southland.

Count 2: Failure to Maintain Client Funds in Trust Account (Rule 4-100(A))

Rule 4-100(A) provides that a member must maintain the balance of funds received for the benefit of a client and deposited in a bank account labeled "Trust Account," Client's Fund Account" or words of similar import.

There is clear and convincing evidence, respondent wilfully violated rule 4-100(A) by failing to maintain a balance \$14,740, received on behalf of Anderson in his client trust account until the first payment to Anderson on October 11, 2002.

Count 3: Moral Turpitude - Misappropriation (Bus. & Prof. Code, § 6106)

Section 6106 makes it a cause for disbarment or suspension to commit any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his or her relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not.

There is clear and convincing evidence that respondent violated section 6106 by misappropriating at least \$12,738.37 of funds from his client trust account. Respondent still has not explained what happened to the money.

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¹References to rule are to the current Rules of Professional Conduct, unless otherwise noted.

IV. Mitigating and Aggravating Circumstances

A. Mitigation

No mitigating factor was shown by clear and convincing evidence except respondent's nearly 11 years of discipline-free conduct at the time the misconduct commenced. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e)(i).)²

B. Aggravation

There are several aggravating factors. (Std. 1.2(b).)

Respondent committed multiple acts of wrongdoing, including failing to promptly pay client funds; failure to maintain client funds in trust; and misappropriation of client funds. (Std. 1.2(b)(ii).)

Although respondent finally disbursed Anderson's settlement funds to Anderson and later to the medical providers, his delay of approximately 15 months caused his client substantial harm. Anderson was concerned that his credit rating would be harmed and that his relationship with Kaiser would be harmed. Anderson's relationship with Kaiser was important to him since he was then and is currently being treated by Kaiser for another health matter and did not want that relationship damaged. (Std. 1.2(b)(iv).)

Respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. During the hearing of this matter, respondent appeared late for all three court sessions. In addition, respondent has shown indifference to the charges and to Anderson, testifying that Anderson received a "windfall" because respondent was able to reduce the amount of the medical liens and that respondent added an additional \$500 to Anderson's final disbursement payment. Respondent's cavalier attitude toward Anderson and his misconduct certainly does not reflect any atonement on his part. (Std. 1.2(b)(v).)

V. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession and to maintain the highest

²All further references to standards are to this source.

possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

Respondent's misconduct involved one client matter. The standards for respondent's misconduct provide a broad range of sanctions ranging from reproof to disbarment, depending upon the gravity of the offenses and the harm to the client. (Std. 1.6, 2.2(a) and (b) and 2.3.) The most severe sanction is found at standard 2.2(a) which recommends disbarment for wilful misappropriation of entrusted funds unless the amount misappropriated is insignificantly small or unless the most compelling mitigating circumstances clearly predominate, in which case the minimum discipline recommended is one year actual suspension. The standards, however, are only guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) "[E]ach case must be resolved on its own particular facts and not by application of rigid standards." (*Id.* at p. 251.) The court will look to applicable case law for guidance.

The State Bar urges disbarment. In support of its recommendation, the State Bar cited several cases, including *Kelly v. State Bar* (1988) 45 Cal.3d 649 and *In the Matter of Grimm* (1991) 53 Cal.3d 21. Respondent argues that he should not be disbarred but did not cite any case or make any recommendation as to the length of any suspension.

Having considered the facts and the law, the court recommends disbarment because of the gravity of the misconduct and because the aggravating factors present herein clearly predominate over the mitigating factor.

Attorneys have been disbarred for misappropriating less money than respondent did in this case. (See, *i.e.*, *Grim v. State Bar*, *supra*, 53 Cal.3d 21 (\$5546); *Worth v. State Bar* (1978) 22 Cal.3d 707 (\$1633).)

Disbarment has been imposed even when it is the attorney's first instance of discipline. In *In re Abbott* (1977) 19 Cal.3d 249, an attorney was disbarred for misappropriating \$29,500 from one set of clients and for misrepresenting the status of the funds and of their case while suffering from manic-depressive psychosis. He was criminally convicted for the misappropriation. In mitigation, the Court found no prior discipline in 13 years of practice and

evidence of good character, including from attorneys and judges. Although the crime may have been at least in part a result of his mental health problem, that would not exonerate him since his prognosis was not uniformly favorable. The Court noted that, if he should seek reinstatement, he would have the opportunity to demonstrate his rehabilitation. Although *Abbott* dealt with the misappropriation of a greater amount of money than the present case, it also presented substantially greater mitigation and no aggravating circumstances.

In *Chang v. State Bar* (1989) 49 Cal.3d 114, the attorney was disbarred for misappropriating over \$7000 by secretly opening a trust account in his own name while employed by a law firm, depositing his clients' funds in the trust account, later taking the funds, failing to comply with the client's request for copies of bank records and refusing to pay the client the funds owed. The attorney was also found to have failed to cooperate in the disciplinary investigation by making misrepresentations to a State Bar investigator. The attorney offered no evidence in mitigation, but it was noted that he had no prior record of discipline. In ordering disbarment, however, the Supreme Court noted that it had several reasons to doubt that the attorney would conform his conduct in the future to the professional standards required of attorneys in California. In particular, the Supreme Court noted that the attorney had never acknowledged the impropriety of his actions; he had made no effort at reimbursing the client, and displayed a lack of candor to the State Bar.

The court has similar concerns to those in *Chang* regarding respondent herein. He has expressed no remorse for his misconduct. He has shown a cavalier attitude toward his client and toward these proceedings. There is no explanation as to the cause of the misconduct, if any, and what happened to the misappropriated funds. These factors lead the court to doubt that respondent would conform his conduct to the ethical norms required to practice here. In consideration of such doubt, the court can only recommend disbarment for the protection of the public, the courts and the legal profession. If he should seek reinstatement, he will have to demonstrate his rehabilitation by the most clear and convincing evidence.

VI. DISCIPLINE RECOMMENDATION

IT IS HEREBY RECOMMENDED that respondent DAVID BRIAN WEINTRAUB be

DISBARRED from the practice of law in the State of California and that his name be stricken from the rolls of attorneys in this state.

It is also recommended that the Supreme Court order respondent to comply with rule 955, paragraph (a), of the California Rules of Court within 30 calendar days of the effective date of the Supreme Court order in the present proceeding, and to file the affidavit provided for in paragraph (c) within 40 days of the effective date of the order showing his compliance with said order.

VII. COSTS

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

VII. ORDER REGARDING INACTIVE ENROLLMENT

It is ordered that respondent be transferred to involuntary inactive enrollment status pursuant to section 6007(c)(4). The inactive enrollment shall become effective three days from the date of service of this order and shall terminate upon the effective date of the Supreme Court's order imposing discipline herein or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: February 10, 2006

RICHARD A. PLATEL
Judge of the State Bar Court